IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1366 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JYOTSNABEN WIFE OF BHANUPRASADJAGANNATH - Appellant(s)
Versus
MADHUKANTABEN RAMESHCHANDRA THAKAR & 9 - Defendant(s)

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Appearance :

Mr. MR RAVAL for MR. HJ NANAVATI for the appellant.

Ms. SUMAN KHARE for respondent No.1.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 30/11/2005

ORAL JUDGMENT

1. The judgment and decree under challenge in this appeal was

rendered by learned Judge of Court No.8, City Civil Court, Ahmedabad, on the 23rd December, 1982, in Civil Suit No.3413 of 1981.

1.1 The present appellant was defendant No.2 in the suit. The suit was preferred by present respondents No.1, 2, 3, 4 and 5, whereas rest of the respondents were co-defendants of the appellant.

2. The suit was filed for declaration that the registered Will dated 26th September, 1997 purported to have been made by deceased-Mulshanker Gaurishanker is unnatural, suspicious, illegal and inofficious with a further declaration that the Will dated 19th August, 1972 stood revoked by virtue of the Will dated 26th September, 1977. A declaration is sought that the properties of deceased-Mulshanker are ancestral properties in the hands of the heirs of deceased-Mulshanker, the same be partitioned after deciding shares of the plaintiffs and for possession of the share of the plaintiffs valued at Rs.22,184.75 ps. in the amount of Rs.42,077.15 ps. deposited in the Court on 25th January, 1980. It was also prayed that the plaintiff be awarded Rs.500/- as maintenance per month till the disposal of the suit and the property lying in the Court be charged for the same. Injunction against the defendants from interfering with the Shahpur property was also sought with several other prayers.

3. In order that the parties' respective cases can be properly understood and appreciated, certain facts need to be recorded.

3.1 Plaintiff No.1 was the daughter-in-law of deceased-Mulshanker, who died on 10th November, 1980, leaving behind him defendant No.1 as the widow, defendant No.2 as his daughter and defendant No.4 as his son. Plaintiffs No.2 to 5 are the children of plaintiff No.1 and defendant No.4. Defendant No.3 is the son of defendant No.2 and defendants No.5 and 6 are the tenants of the property situated at Shahpur. The suit came to be filed by plaintiff No.1 as guardian and best friend of plaintiffs No.3 to 5. Interest of plaintiff No.1 is not adverse to plaintiffs No.3 to 5. Deceased-Mulshanker having died leaving beind him House No.1203, situated at Rangila Pole, Shahpur (hereinafter to be referred to as “the suit property”), the plaintiffs are residing in the front portion of the ground floor of the suit property, defendants No.1 and 4 are residing in the rear two rooms on the ground floor of the suit property, defendants No.5 and 6 are the tenants of the first floor of the suit property and defendants No.2 and 3 are residing on the second floor of the suit property. Defendants No.5 and 6 are joined as tenants of the property.

3.2 Earlier plaintiff No.1 had filed a suit against deceased-Mulshanker and other defendants bearing Civil Suit No.2965 OF 1978, wherein it was ordered that the sale proceeds of Girdharnagar property be deposited in the Court and be invested in a fixed deposit. It was also ordered that, out of the interest, Rs.125/- be paid to plaintiff No.1 towards maintenance. The said amount of Rs.125/- was reduced to Rs.50/- in an appeal preferred to challenge the said order. The said suit came to be disposed of on 19th June, 1980, against which First Appeal 4298 of 1980 was filed.

3.3 It was the case of the plaintiffs that they came to be know that defendant No.2 made an application for mutation of the suit property in her name and, on inquiry, the plaintiffs learnt that deceased-Mulshanker executed a Will on 26th September, 1977. According to the plaintiffs, the Will is not a genuine Will. The Will is not in consonance with the moral duty, natural law and feelings of the deceased. The case of the plaintiffs is that the Will is made under undue pressure and influence and it does not reveal true mental condition of the maker. Allegations were levelled against defendants No.1, 2 and 3 of having influenced the deceased and the deceased was not in a firm state of mind

at the time the Will was made. It is also the case of the plaintiffs that, from the said Will, it appears that the deceased had executed a Will on 19th August, 1972, but the said Will of 1977 revokes the same and, therefore, the defendants are not entitled to any of the properties mentioned in the said Will of 1972 or 1977. The property of the deceased is self-acquired. The property would go to the heirs of the deceased by succession in absence of a valid Will.

4. The suit came to be opposed by the defendants by filing written statement, at Ex.25, raising following contentions :-

4.1 That the plaintiffs have no right to file the suit. Properties of the deceased were self-acquired and it has been so stated in Civil Suit No.2965 of 1978 and, as such, the contention would be barred by *res judicata*. The present suit also would be barred by *res judicata*. Deceased-Mulshanker executed a Will on 26th September, 1997, in accordance with law and the same was registered. The said Will, being perfectly legal, shall have binding effect on the plaintiffs also. If the said Will is not accepted, then the Will of 1972 will not stand revoked and defendants No.1 and 2 will have complete interest in the property. The plaintiffs have no right or interest in the suit property and the properties

are not liable to be partitioned.

5. The Trial Court framed issues at Ex.11 as under :-

"(1) Do plaintiffs proved that the properties of the deceased are the Joint Hindu family properties? If yes, what is the share of the plaintiff?

(2) Is the suit not maintainable?

(3) Is the issue No.1 barred by res judicata?

(4) Do defendants proved that either of the Wills is legal proper and valid one?

(5) What decree and order?"

6. The finds of the Trial Court on the above issues were as under :-

"(1) In the affirmative.

(2) In the negative.

(3) In the negative.

(4) In the negative.

(5) As per final order."

7. Ultimately, the Trial Court passed the decree, which has aggrieved original defendant No.2, who has preferred this appeal.

8. Learned Advocate, Mr. Raval, for the appellant and learned Advocate, Ms. Suman Khare, for respondent No.1 have been heard. Rest of the respondents have chosen not to contest this appeal though served with notice of admission.

9. Learned Advocate, Mr. Raval, has taken this Court through the judgment impugned and the evidence on record.

9.1 According to Mr. Raval, the Trial Court committed an error in not accepting the evidence of attesting witnesses to the Will. Both the witnesses have been examined and have identified the signature of the deceased. The Trial Court ought to have accepted their version and ought to have accepted the will. If the Will is accepted to have been proved, by virtue of the will, the property would devolve on the appellant and defendants No.1 and 3. Mr. Raval submitted that it was open for the deceased to bequeath his self-acquired property. These aspects having not been considered by the Trial Court in their proper perspective, the

Trial Court ran into an error and, therefore, the appeal may be allowed.

10. Learned Advocate, Ms. Khare, on the other hand, submitted that the case depends mainly on the Will. She submitted that the deposition of the witnesses have been, in detail, considered by the Trial Court and legal and cogent reasons are shown by the Trial Court for not accepting them as valid attesting witnesses. As a result, the execution of the Will is not accepted by the Trial Court. The privilege claimed by the appellant and defendants No.1 and 3 over other parties is only by virtue of the Will and, if the Will is not properly established, they would stand in their respective position vis-a-vis the other parties to the suit or litigation. According to Ms. Khare, it should not make any difference whether the property is ancestral or self-acquired once the Will is not proved. The parties will have their claim as successor of the deceased wherever they stand. She, therefore, submitted that the Trial Court cannot be said to have committed any error while passing the decree and the appeal, therefore, may be dismissed.

11. Having heard the learned advocates for parties and having gone through the evidence and the judgment, this Court is of the opinion that the question that first requires consideration and the question on

which the decision would depend is whether the Will, Ex.46, can be said to have been erroneously held by the Trial Court to be illegal, improper and invalid. Once the validity or otherwise of the Will is decided, rest of the questions may be gone into, if need arises.

12. The appellant claims her right on the property through Will, Ex.46. The said Will is dated 26th September, 1977 and is registered. The attesting witnesses are (1) Babubhai Amarsing and (2) Hariprasad Atmaram, who have been examined at Ex.25 and Ex.35, respectively.

12.1 Deposition of attesting witness, Hariprasad Atmaram (Ex.35), if perused, inspires no confidence of this Court and he failed to inspire confidence of the Trial Court as well. A reading of that deposition makes it clear that this witness does not satisfy the requirements of Section 63 of the Indian Succession Act. He is found to be a professional witness, who sits in the office of the Sub-Registrar and puts his signature on any document that he is asked to as attesting witness. Apart from this character of his, he has, in fact, admitted in respect of the present case that he had never seen Mulshanker signing the Will but he had put his signature at the behest of a lawyer. He claims that he had put signature on a document of land. The witness also states that he knew Mulshanker

as he was told that the person who signed was Mulshanker. The Trial Court, after noticing few features, came to a conclusion that Hariprased did not know Mulshanker personally and his evidence cannot be accepted as a proof of the Will, Ex.46.

12.2 Likewise, if the evidence of another attesting witness, Babubhai Amarsing (Ex.25), is examined it is found that he signed at the instance of Hariprasad Atmaram (the other attesting witness). He also states that he went their while Hariprasad Atmaram was signing the document. This witness is not so literate and is not able to identify signature of Mulshanker Gaurishanker. He admits that the said signature was not put in his presence, but was put prior to his reaching there. He also did not know Mulshanker, but he says that the person who signed as Mulshanker was Mulshanker. Resultantly, this witness also did not know Mulshanker nor does he say that the signature was put in his presence and the Trial Court, therefore, came to a conclusion that the requirement of clause (c) of Section 63 of the Indian Succession Act was not satisfied and rightly so.

12.3 A perusal of the evidence of these two witnesses reveals that neither of the witnesses knew deceased-Mulshanker nor do they say that

Mulshanker certified that he had put the signature on the Will. Neither of them say that the signature was put in their presence and the Trial Court was, therefore, fully justified in not accepting the evidence of either of the attesting witnesses. As a consequence, the Trial Court was justified in not believing the Will. This Court is in agreement with the reasonings adopted and conclusions reached by the Trial Court in respect of validity of the Will.

13. Once the Will is held to be illegal and invalid, the question whether the property was ancestral or self-acquired becomes insignificant. The deceased can be said to have expired intestate and the property would devolve by succession. Further, the Trial Court has examined this aspect as well and, after considering the evidence led by parties in its proper perspective, decision is rendered. This Court finds no reason to interfere with the reasonings adopted and conclusions reached by the Trial Court. The appeal, therefore, must fail and stands dismissed. Judgment and decree of the Trial Court is hereby confirmed. No costs.

14. Learned Advocate, Mr. Raval, at this stage, prays for suspension of operation of the order passed today to enable the

appellant to approach higher forum. The operation of this order is suspended for a period of four weeks from today.

[A. L. DAVE, J.]

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